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No. 91-1537

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RICARDO GARZA, JUANITA R. GARZA,
AND ISMAEL SOSA,
Petitioners,
v.
UNITED STATES OF AMERICA
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

Now comes Petitioners and through the undersigned file this Supplemental Brief regarding the Petition for Writ of Certiorari pursuant to Supreme Court Rule 15.7 and present to this Honorable Court intervening matter which comprise compelling reasons for the Court to entertain the Petition for Writ of Certiorari which was filed out of time in this cause.

Counsel, Cynthia Hujar Orr, mistakenly relied on Rule 33.7 of this Court believing that same authorized the filing of typewritten copies of the Petition for Writ of Certiorari with prompt replacement by printed copies. This

is the first Petition for Writ of Certiorari that Mrs. Orr has assisted in preparing and filing with this Court and Mrs. Orr did not intend to circumvent this Honorable Court's rules.

Mrs. Orr first appeared before this Honorable Court on a Brief Amicus Curiae in *Cable News Network, Inc. and Turner Broadcasting System, Inc., v. Manuel Antonio Noriega and United States of America*, Cause No. 90-767 (1990) in which this Court allowed the filing of a typewritten brief with replacement by printed copies. She therefore believed that same was a procedure authorized by this Court's rule 33.7. However, Mrs. Orr now realizes that the brief amicus curiae she assisted with was an emergency appeal and understands that same must have therefore been given exceptional treatment.

The Rule upon which Mrs. Orr mistakenly relied states:

> The Clerk shall not accept for filing any document presented in a form not in compliance with this Rule, but shall return it indicating to the defaulting party any failure to comply. *The filing, however, shall not thereby be deemed untimely provided that new and proper copies are promptly substituted.* If the Court finds that the provisions of this Rule have not been adhered to, it may impose, in its discretion, appropriate sanctions including but not limited to dismissal of the action, imposition of costs, or disciplinary sanction upon counsel.

Supreme Court Rule 33.7 [emphasis supplied]. Mrs. Orr misinterpreted the above rule to permit the procedure she followed in filing the Petition for Writ of Certiorari with this Court.

On February 24, 1992[1], counsel filed a typewritten Petition for Writ of Certiorari[2]with this Court through the United States Postal Service and on the following day provided Alpha Law Brief Company same to be printed. Believing that she had timely filed the Petition for Writ of Certiorari with this Court, Mrs. Orr did not seek an extension of time for filing same. When the printed Petitions for Writ of Certiorari were received from Alpha Law Brief Company by counsel same were forwarded to this Court to replace the typewritten petitions. On April 2, 1992 Mrs. Orr called the United States Supreme Court Clerk to inquire regarding the status of the petition and was then informed of her error. The Clerk explained that the petition was not deemed filed until March 19, 1992 when the printed copies were received. *See* affidavit in Appendix of Cynthia Hujar Orr p. 1a, *infra*.

This Petition for Writ of Certiorari should be entertained for the compelling reason that counsel, who was assisting for the first time in the preparation of a Petition for Writ of Certiorari, was operating under a reasonable, but mistaken, belief that this Court's rules permitted the procedure she followed. More importantly, failure to review and reverse the decision below would endanger the fundamental constitutional right of those who are criminally accused to a unanimous jury verdict in federal court. *Cf. United States v. Mazurie*, 415 U.S. 947 (1974), 419 U.S. 544 (1975) [civil division of Department of Justice was mistaken about time within which Petition for Writ of Certiorari in a criminal case should be filed and the decision below endangered Indian rights]. This Honorable Court should waive the untimely filing of the Petition. *See,*

1The due date.

2The petition was accompanied by the certificate of service and appropriate docket fee.

Schacht v. United States, 398 U.S. 58, 63-64 (1970) [unanimous Court held untimely filing could be waived].

Respectfully submitted,

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By: _____
GERALD H. GOLDSTEIN,
Counsel for Petitioners.

**Counsel of record for Petitioners*

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CERTIFICATE OF SERVICE

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* *Counsel of Record for Petitioners*

I, Gerald H. Goldstein, a member of the Bar of this Court, hereby certify that on this _____ day of April, 1992, three copies of the Supplemental Brief were served by first class mail, postage prepaid upon Mervyn Hamberg, Attorney, Department of Justice, P. O. Box 899, Ben Franklin Station, Washington, D.C., 20044-0899, counsel for the respondent the United States of America herein, and upon the Solicitor General, Department of Justice, Washington, D.C. 20530 and upon Mr. Charles Roberts, Counsel for Appellant below, Maria Rosario Ortiz, 123 Mills, Suite 306, El Paso, Texas 79901. I further certify that all parties required to be served have been served.

_____

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Counsel of Record for the Petitioners

APPENDIX

AFFIDAVIT

STATE OF TEXAS §
§
COUNTY OF BEXAR §

BEFORE ME, the undersigned Notary Public, on this day personally appeared CYNTHIA HUJAR ORR, who, being by me duly sworn on oath deposed and stated:

"I am assisting counsel for the petitioners in this cause, no. 91-1537. I have read the above and foregoing Supplemental Brief, and every allegation of fact contained therein is true."

_____
CYNTHIA HUJAR ORR
Affiant

SUBSCRIBED AND SWORN TO BEFORE ME, on the _____ day of_____,1992, to certify which witness my hand and official seal.

_____
Notary Public in and for
the State of Texas